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No. _____

In The
Supreme Court of the United States

STATE OF OHIO.
Petitioner,
v.
BRIAN K. SILER,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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January, 2008

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ISSUES PRESENTED FOR REVIEW

1. Whether the state of mind of the declarant is relevant to whether a statement in response to an officer's question is "testimonial" or whether the sole determining factor is the purpose of the police officer.

2. Whether the Ohio Supreme Court erred in holding that statements of children made in response to questions by police officers are testimonial, regardless of the age, purpose, or understanding of the child, if the purpose of the police officer is investigatory.

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No.

IN THE SUPREME COURT OF THE
UNITED STATES

STATE OF OHIO

Petitioner

v.

BRIAN K. SILER

Respondent

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT
OF OHIO

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Ohio, respectfully prays this Court to issue a Writ of Certiorari to review the judgment of the

Ohio Supreme Court in ***State v. Siler***, 116 Ohio St. 3d 39, 2007-Ohio-5637, issued on October 25, 2007.

OPINIONS BELOW

On December 6, 2004, this Court remanded the instant case to the Fifth District Court of Appeals for reconsideration in light of ***Crawford v. Washington*** 541 U.S. 36, (2004). The appellate court, in ***State v. Siler***, 164 Ohio App.3d 680, 2005-Ohio-6591, on December 13, 2005, reversed the conviction and ordered a new trial. (Appendix B) The appellate court granted the State of Ohio a stay to pursue an appeal to the Ohio Supreme Court.

The State appealed and the Ohio Supreme Court accepted jurisdiction. On

October 25, 2007, the Ohio Supreme Court in ***State v. Siler*** 116 Ohio St. 2d 39, 2007-Ohio-5637, affirmed the appellate court. (Appendix A.)

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(a). On October 25, 2007, the Ohio Supreme Court affirmed the lower court's reversing Respondent's conviction. Petitioner, State of Ohio, now timely files this Petition for Writ of Certiorari.

CONSTITUTUIONAL PROVISIONS AT ISSUE

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.***(Appendix C).

STATEMENT OF THE CASE

By 6:00 a.m. on September 20, 2001, thirty-nine year old Barbara Siler's lifeless body was hanging in her garage, her toes touching the floor, her body held upright by a yellow rope wrapped around the garage door track at one end and Ms. Siler's neck at the other. She died between 4:00 a.m. and 6:00 a.m., not from hanging but from "asphyxia from strangulation as a consequence of cervical compression.".

Mrs. Siler and her husband, Respondent, Brian Siler, had for many months suffered marital problems. In June or

July, his face distorted with rage, Respondent often told two male friends that he wanted to hurt his wife as much as she had hurt him. Mrs. Siler called 911 at least three times because Respondent tried to choke her. All efforts at reconciliation having failed, Mrs. Siler demanded a divorce. Respondent refused to accept the idea of a divorce. He began stalking his wife and keeping a log of her movements. Only after Ms. Siler obtained a protective order did Brian Siler leave their home. He moved five or six miles away, into the home of his brother, Kevin Siler, and Kevin's wife, also named Barbara. Mrs. Brian Siler changed the locks on the doors.

On the evening of September 19, 2001, Brian and Kevin Siler were at Kevin's home and Kevin Siler's wife was at work. Kevin Siler went to bed between midnight and 12:30.

Used to his wife's arriving home from work between midnight and 2:00 a.m., he slept through the night. Mrs. Kevin Siler arrived home at 1:30 a.m. on September 20, 2001. She began working on her home computer. At about 3:00 a.m., Brian Siler emerged from his room, used the bathroom, and got a drink of water from the kitchen. He stopped at the door to the office and spoke to his sister-in-law, then went back into his room and closed the door. Mrs. Siler went to bed at about 4:00 a.m. About fifteen minutes after she went to bed, she heard "some banging around.***a clunking," from Respondent's bedroom, which shared a wall with the master bedroom. The sounds stopped and she went to sleep. Respondent's room had a window with a removable screen.

When Mrs. Brian Siler failed to appear for work, law enforcement officers went to her house. Deputy Ron Singleton was the first officer to arrive, at 1:54 p.m. He found Barbara Siler's body. The door from the outside into the garage had been forced open. Inside the garage was Mrs. Siler's van, the driver's door open. Deputy Singleton found Nathan asleep in his bed, wearing pajamas but uncovered. Singleton found it very difficult to awaken Nathan. When Nathan saw Singleton, he looked a little startled but said nothing. Asked if his Daddy had been there today, Nathan said "no." As Detective Singleton carried Nathan through the garage, shielding his view of his mother's body, Nathan pointed back to the garage and said, "Find Mommy." Deputy Singleton delivered Nathan to his grandfather.

Detective Larry Martin arrived on the scene at about 2:00 p.m. Detective Martin first spoke to Nathan as Nathan sat on his grandfather's lap. Their conversation was often interrupted, as Nathan frequently jumped up and ran around the yard. Preoccupied with his mother, Nathan kept trying to go back into the garage. When Detective Martin asked if anything had scared Nathan, Nathan responded, "Daddy." Asked how, Nathan said, "loud knocking." Asked what he meant, Nathan left his grandfather's lap and banged his palm on the front door. Detective Martin asked if anything else scared him. Nathan said, "Daddy and Mommy fighting." Asked where, he said they were fighting in the garage. Detective Martin sent Nathan to lunch with a family friend. After lunch, Martin asked Nathan if anyone was hurting Mommy. "Daddy did," Nathan said.

Using a children's services investigator, Jenny Taylor, to demonstrate, Martin stood behind Taylor and put his arms around her. Nathan said, "up." When Martin raised his hands to Taylor's throat, Nathan said, "yes," and began crying. Later, Nathan said that Daddy put a yellow rope around Mommy's neck.

Testing for DNA of the knot around Mrs. Siler's neck and the knot around the garage door track showed that Mrs. Siler could not be excluded as a source for the DNA from the knot around her neck but could be excluded as a DNA source from the knot around the garage door track; and that Respondent could be included as a source for the DNA at both knots.

Martin and Singleton took Respondent from his brother's house to the sheriff's

department. Respondent had fresh injuries on his hands between his thumb and fingers, and between his ring finger and index finger. He also had fresh scrapes on his knuckles and scratches on his chest, just below his neck. Eventually, the officers left Respondent alone in an interview room, which was equipped with a hidden camera, in the homicide unit. Detective Singleton watched on video. Respondent lay down. To enter the homicide unit, officers must use a key card. The card causes beeps and clicks. When Respondent heard the beeps and clicks, he arose from the couch, sat at the table, put his head in his hands, and started sobbing, just as the officers entered the room.

Based on evidence of long-standing, violent marital discord; DNA evidence; Respondent's statements to friends; and excited utterances of the couple's three-year-old son, Nathan Siler, a jury convicted Respondent of aggravated murder and death penalty specifications. Although the jury recommended the death penalty, the court sentenced Respondent to life in prison without parole.

REASONS TO GRANT THE WRIT

This court should grant certiorari because the Ohio Supreme Court erred in ruling that the "objective witness" test of ***Crawford v. Washington*** 541 U.S. 36, 124 S. Ct. 2266 (2004) and the "primary purpose" test of ***Davis v. Washington*** 547 U.S. 813, 126 S. Ct. 2266 (2006) are mutually exclusive. The Ohio Supreme Court decided that the "objective witness" test is irrelevant to statements made by a child of any age responding to a police officer's questions. The Ohio Supreme Court decided that whether statements of children answering questions of police officers are "testimonial" depends solely on the purpose of the police officers. That test is inconsistent with this

Court's opinion in ***Davis v. Washington***, and fails to serve the purpose of the Confrontation Clause of the Constitution of the United States of America.

The Ohio Supreme Court erred in holding that the "objective witness" test is inapplicable when the declarant is a child of any age who answers an officer's questions. In holding that the primary purpose of the police officer is the only relevant factor, the Ohio Supreme Court ignored all language in ***Crawford v. Washington*** and ***Davis v. Washington*** to the effect that the purpose and understanding of the declarant matters. In fact, the Ohio Supreme Court, at Appendix A-19, incorrectly said that this court in ***Davis v. Washington*** did not

consider the expectations of a declarant significant.

On the contrary, the decision in ***Davis*** is not a departure from ***Crawford*** but a reaffirmation. This Court in ***Davis*** never said that the primary purpose test applied only to an officer's purpose. Rather the court used the phrase the "primary purpose of the interview." This court relied both on the purpose of the 911 caller and the purpose of the police. Because the evil that the Confrontation Clause is intended to protect against is an absent accuser, when deciding whether a statement is testimonial, the state of mind of the declarant should be at least as important as the state of mind of the officer asking the questions.

For statements to be "testimonial," Petitioner submits, there must be some intent or understanding by the declarant that the statements will likely be used in court. While a seventeen year old child may understand legal proceedings as well as the adults in ***Davis*** and ***Hammon v. Indiana*** 547 U.S. 813, 126 S. Ct. 2266 (2006), it is unlikely that a very young child would ever contemplate legal proceedings.

The instant case is similar to ***White v. Illinois***, 502 U.S. 346, (1992), in which statements of a four-year-old victim to a police officer had been admitted at trial as excited utterances. The defendant argued that the confrontation clause required that such statements be excluded unless the state

produced the declarant at trial or proved that the declarant was unavailable. This court rejected that argument.

This court in ***Crawford v. Washington***, 541 U.S. 36 (2004), describes ***White v. Illinois*** as a "minor, arguable exception." (f.n. 8 and 9,). It is unclear whether the word "arguable" means that the statements in ***White*** were "testimonial." The exception that the Ohio Supreme Court established for children, however, is that all children's statements are testimonial, regardless of the understanding or age of the child, if the purpose of the police is to investigate a prior event. That test would allow a seventeen-year-old who is a good actor to frantically call for help and

disappear before police arrived. Because the police were responding to an on-going emergency, the declarant's deliberate statements would be "non-testimonial." At the same time, the Ohio Supreme Court's test would keep out important statements of a child who is too young to communicate other than by responding to questions and too young to understand that he is even making an accusation.

The lower court erred in ruling that every statement Nathan Siler made in response to questions by a police officer was "testimonial." The questioner's being a police officer, the lower court decided, was, under, ***Davis v. Washington***, 126 S.Ct.

2266(2006) and ***Hammon v. Indiana*** 126 S. Ct. 2266 (2006), dispositive.

Davis and ***Hammon*** both involved domestic abuse of adult women. In ***Davis***, a woman who was being attacked called 911. Responding to the operator's questions, the woman named her attacker, then said he was leaving. Those statements, the court held, were non-testimonial. Neither the 911 operator nor the woman was contemplating court proceedings. Later statements made by the victim in ***Davis***, the court held, were testimonial. In ***Hammon***, police officers, responding to a domestic violence call, found a woman sitting on her porch. She said she was fine. Later, inside the house, after the defendant had been restrained, she reported

abuse. Still later, she signed an affidavit. This Court held all incriminating statements in ***Hammon*** testimonial. In both cases, the court said, a reasonable person would have understood that the statements she made after the defendants left could be used in court.

Davis and ***Hammon*** are fact specific and amount to a finding that, as a matter of law, statements made under the circumstances in ***Davis*** and ***Hammon*** are testimonial, and, therefore, excluded by ***Crawford***. This Court, however, limited the holding in ***Davis*** and ***Hammon*** to cases "like" them. The court in ***Davis*** and ***Hammon*** itself qualifies its holding to make it clear that the court does not mean that the

only thing that matters is the purpose of the police. In the footnote to the holding, note 1, page 2274, the court explains that some statements might be testimonial, even if the police have no purpose and ask no questions. The last sentence of that same footnote is "And of course, even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the confrontation clause requires us to evaluate."

The distinction in ***Davis*** between what is happening and what has happened applies also to the declarants in those cases. The purpose of a declarant who calls 911 is to summon help. Once help is on the way, the purpose is accomplished. The declarants

in ***Davis***, after the police are on the scene, the court said, would reasonably understand that statements to the police may be used in court. The primary purpose test of ***Davis*** and ***Hammon*** does not eliminate the requirement discussed in ***Crawford*** and adopted by the Ohio Supreme Court in ***State v. Stahl*** (2006) 111 Ohio St.3d 186, 2006-Ohio-5482 that the declarant understand that statements could be used in court. Rather, the court in ***Davis*** and ***Hammon*** quickly found that the adults in question understood that their statements could be used in court and moved to the second step of deciding the primary purpose of the police officer.

Very young children, however, cannot understand the "legal ramifications" of their statements, even when made to police officers. In ***Davis*** and ***Hammon***, the declarants were both adults who had called the police asking for help. A person who calls the police because that person is being attacked, implicitly understands that a crime has been committed. Such a person also knows that the police investigate crimes. Very young children have no such understanding.

If this court meant to hold that statements to a police officer were always testimonial, regardless of the understanding of the declarant, the court would have said so. Rather, this court is deciding each case

on its facts and urging lower courts to do the same. ***Davis*** and ***Hammon*** both involved adults talking to police officers whom they themselves had called. Normal adults understand that the police investigate crime, that hitting people is illegal, and that people who do illegal things often are brought to trial.

Three-year-old Nathan Siler, however, understood none of those things. He did not know enough to call 911 when he could not awaken his mother. He may not have known that Detective Martin was a police officer. Detective Martin had never been to the Siler home. Detective Martin wore plain clothes and talked to Nathan in Nathan's yard as Nathan sat on his grandfather's lap. At least

before lunch, the purpose of Nathan's conversation was, in Nathan's mind, to "Find Mommy." Moreover, Nathan had no reason to believe that his statements would get his father into trouble of any kind, much less be used in court. Nathan had seen his father hit or choke his mother at least three times. Although uniformed deputy sheriffs came, nothing happened to his father. Nathan had no reason to believe that the consequences of his father's having choked his mother would be any different this time. Nathan obviously did not understand that his mother was dead, as he said she was sleeping standing up.

After lunch, the tone of the conversation changed. Detective Martin's

demonstration with the case worker was more obviously intended for use at trial. Nathan also seems to have developed a sense that this time something was different from the three other times his father had choked his mother, as Nathan was crying. If the statements after lunch were testimonial, admitting them was harmless error. Ample other evidence proved how Mrs. Siler died. Nathan's first statements that Daddy and Mommy fought in the garage established, along with other evidence, that Respondent killed her. The Ohio Supreme Court erred in considering the two statements as one.

Petitioner respectfully suggests that a three-year old child is incapable of contemplating court proceedings, thus

rendering any statement of a three-year-old child "non-testimonial." That does not mean that a statement of a three-year-old would always be admissible; the statement would still have to fit within a hearsay exception.

The evil that both the Confrontation Clause and the cases of ***Crawford v. Washington*** and ***Davis v. Washington*** seek to protect defendants against is not the limited expressions of three-year-olds but the star-chamber tactics of trial by affidavit. Equating statements to a police officer with star-chamber tactics assumes at least a basic understanding that the declarant is "accusing" someone and that serious consequences may occur from the accusation.

CONCLUSION

The Ohio Supreme Court held that when deciding whether a statement is "testimonial," either ***Crawford*** or ***Davis*** applies, but not both. Purporting to follow ***Davis***, the Ohio Supreme Court applied only half of the case, holding that the only significant factor is the purpose of the police officer. This Court limited the holdings in ***Davis*** and ***Hammon*** to their facts. The facts in ***Davis*** and ***Hammon*** are 1) an adult 2) called the police for help and 3) made statements she knew were relevant to a crime. Three-year-old Nathan Siler, who thought his mother was "sleeping standing up," answered questions asked by a man in

plain clothes whom he had never seen before, as he urged that person to "Find Mommy." It is unclear whether Nathan even knew the detective was a police officer. It would never occur to a reasonable three-year-old, under the circumstances of the instant case, that his statement would be available for use at a later trial.

A state court is not free to apply the federal constitution in a different way from that applied by this court. This court has said that whether a statement is "testimonial" depends upon the facts of each case, including the knowledge of the declarant.

The Ohio Supreme Court could have, consistent with ***Davis***, adopted either a

reasonable child standard or considered a child's age as one of the circumstances relevant to deciding whether a reasonable person, under all the circumstances, would understand that the person's statement would be used at trial. Instead, the court ruled that when children make statements to police officer's, the age and understanding of the child are irrelevant and only the purpose of the police matters. Petitioner believes that this court never intended that result and asks that the Ohio Supreme Court decision be reversed.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF OHIO FILING:

Opinion,
filed 10/25/07 ..... A1 - A34

ASHLAND COUNTY COURT OF APPEALS FILINGS:

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filed 12/13/05 ..... B1 - B19

OTHER:

Fourteenth Amendment,
United States Constitution ..... C1 - C3

THE STATE OF OHIO, APPELLANT, v.
SILER, APPELLEE.
[Cite as State v. Siler, 116 Ohio St.3d 39,
2007-Ohio-5637.]

Constitutional right to confront witnesses — Hearsay statements by child declarant to police investigator are testimonial — Age of declarant not determinative of whether statements are testimonial.

(No. 2006-0185—Submitted June 5, 2007 – Decided October 25, 2007.)
APPEAL from the Court of Appeals for Ashland County, No. 02 COA 028, 164 Ohio App.3d 680, 2005-Ohio-6591.

SYLLABUS OF THE COURT

1. To determine whether a child declarant's statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006), __ U.S. __, 126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 224, followed.)

2. A declarant's age is not determinative of whether a testimonial statement has been made during a police interrogation.

O'DONNELL, J.

{¶ 1} The state of Ohio appeals from a decision of the Ashland County Court of Appeals that reversed Brian Siler's convictions for aggravated murder and five other offenses and held that the admission of hearsay statements of his three-year-old son at his trial denied him his Sixth Amendment right to confront witnesses against him because his child did not testify at trial and because he had no prior opportunity to cross-examine him.

{¶ 2} The focus of this appeal concerns whether a child's statements made in the course of a police interrogation to a sheriff's deputy should be considered testimonial or nontestimonial, as explained in *Crawford v. Washington* (2004), 541 U.S.

36, 124 S.Ct.1354, 158 L.Ed.2d 177, *Davis v. Washington* (2006), __ U.S. __, 126 S.Ct. 2266, 165 L.Ed.2d 224, and *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834. After careful review, we have concluded that the statements made to the deputy sheriff were testimonial because the circumstances objectively indicate that no ongoing emergency existed and that the primary purpose of the police interrogation was to establish past events potentially relevant to a later criminal prosecution. Accordingly, we affirm the decision of the court of appeals.

Facts and Procedural History

{¶ 3} Brian and Barbara Siler married in 1988 and had one child, Nathan, born in July 1998. In June 2001, Brian discovered that Barbara had been having an affair with one of her co-workers. In the ensuing weeks, Barbara placed several 911 calls to sheriff's deputies due to arguments with Brian. No criminal charges arose from these calls, but Barbara frequently expressed her fear of Brian to friends and family.

{¶ 4} On July 30, 2001, after an incident in which Brian allegedly choked her, Barbara obtained a civil protection order that required Brian to surrender his house keys and garage door openers

and to stay at least 300 feet away from her; it also established a schedule for him to visit Nathan, who continued to live with Barbara. As a result, Brian moved in with his brother and sister-in-law, who lived about five or six miles away. Barbara subsequently filed for divorce, and Brian told several people that he wanted to hurt her as much as she had hurt him.

{¶ 5} On September 20, 2001, Duane Keener, Barbara's father, received a phone call from Barbara's employer, the accounting firm of Whitcomb & Hess, expressing concern that she had not reported to work that day. After unsuccessfully trying to reach her by phone, Keener drove to her house. Upon arrival, he looked through the garage window, noticed that the door to her van was open, and discovered that he could open the side door to the garage by pushing on it. He entered and continued into the house but did not see anyone. Growing worried, he went back outside and called 911.

{¶ 6} Deputy Ron Singleton and Captain Richert of the Ashland County Sheriff's Office responded to the 911 call and met him around 2:00 p.m. They went into the garage and found Barbara Siler's body hanging from a yellow cord tied to the track of the overhead garage door. The Ashland

County Coroner, Dr. William Emery, later estimated that her death occurred eight to ten hours earlier, sometime between 4:00 and 6:00 a.m. that morning.

{¶ 7} Singleton continued into the house by himself and discovered three-year-old Nathan asleep in one of the bedrooms. Upon waking him, he carried Nathan outside through the garage to his grandfather, shielding the child from any view of his mother.

{¶ 8} Detective Larry Martin, a trained child interviewer, arrived shortly thereafter wearing plain clothes with a vest that concealed his badge and gun. While Nathan sat on his grandfather's lap, Martin lay next to them on the ground and began talking to Nathan. Nathan eventually began to ask for his mother and to go back into the house; according to Martin, Nathan also said that his mother was in the garage "sleeping standing." As a result of the questioning, Martin learned that Nathan's father, Brian, had been there the previous night, that he had scared Nathan by banging on the door, and that he had fought with Barbara in the garage. Nathan also told Martin that Brian had placed the yellow rope around her neck.

{¶ 9} The state indicted Brian Siler in December 2001 on two counts of aggravated murder

with death-penalty specifications, two counts of domestic violence, and single counts of endangering children, aggravated burglary, and violation of a protection order. He pleaded not guilty, and a trial commenced in May 2002. As part of its case-in-chief, the state called Deputy Singleton and Detective Martin to testify about Nathan's statements, and, over Siler's repeated objections, the trial court admitted the testimony as excited utterances pursuant to Evid.R. 803.

{¶ 10} On direct examination, Singleton testified that when he carried Nathan from the house, he asked Nathan, "Was daddy here today?" to which Nathan answered "no," and he testified that Nathan told him to "[f]ind mommy," pointing to the garage. On cross-examination, Singleton stated that Nathan did not cry or resist at any point.

{¶ 11} Martin testified that he had been briefed upon his arrival at the scene and before he began speaking with Nathan. He stated that when interviewing a child, he would "attempt to identify what information the child might have as to what had happened." He further testified that when he asked Nathan if anything had scared him the night before, Nathan responded, "Daddy did" by "[k]nocking loudly," and jumped up and

demonstrated by banging on the front door. Martin stated that he asked if anything else had scared Nathan and that Nathan answered, "Daddy, mommy fighting" in the garage.

{¶ 12} Martin also testified that 30 to 45 minutes into his questioning, Nathan said that he was hungry and thirsty, and Martin arranged for him to have lunch with Terrie Cato, a nurse employed by the Ashland County Sheriff's Office and a friend of Barbara and Brian Siler.

{¶ 13} Martin further stated that when they returned from lunch, he again spoke with Nathan, this time in the presence of Jenny Taylor, a children's services investigator who had arrived at the scene. He asked "if anyone was hurting mommy," to which Nathan responded, "Daddy did." Using a teddy bear that had been brought to the scene, Martin asked Nathan to demonstrate how daddy had hurt mommy, but Nathan did not respond. Martin then placed Taylor in different holds, asking Nathan, "Was this how daddy was hurting mommy?" When he placed his arm around the investigator's shoulder from behind, Nathan told him to move his arms up. Martin demonstrated, and Nathan said, "yes," and began crying; until this point in the interrogation, Martin stated, the child had not seemed nervous, upset, or in

any distress. Nathan told Martin that "the yellow thing" held mommy upright in the garage, and, when Martin asked who put the yellow thing on her, the child responded, "Daddy." Martin did not question him further.

{¶ 14} Among other witnesses, the state also called Dr. Andrea McCollom, a forensic pathologist, who testified that Barbara's body displayed injuries that were inconsistent with suicide; rather, in her opinion, Barbara had been hanged after she had died from injuries caused by cervical compression consistent with a choke hold applied from behind.

{¶ 15} At the conclusion of the guilt phase of the trial, the jury found Siler guilty of all counts and specifications and, after the penalty phase, unanimously recommended the death penalty. However, the court rejected the recommendation and instead imposed a sentence of life imprisonment without parole.

{¶ 16} Siler then appealed to the Ashland County Court of Appeals and raised several assignments of error, including a Sixth Amendment challenge to the admission of Nathan's statements to Martin. The appellate court overruled that assignment of error, determined that Nathan's statements were admissible as excited utterances

pursuant to Evid.R. 803(2), and affirmed the convictions. *State v. Siler*, Ashland App. No. 02-COA-028, 2003-Ohio-5749. We denied review of his appeal. *State v. Siler*, 101 Ohio St.3d 1489, 2004-Ohio-1293, 805 N.E.2d 539.

{¶ 17} Siler then appealed to the United States Supreme Court, which granted certiorari, vacated the judgment of the court of appeals, and remanded the case with instructions to reconsider the Sixth Amendment issue in light of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. *Siler v. Ohio* (2004), 543 U.S. 1019, 125 S.Ct. 671, 160 L.Ed.2d 494. On remand, the appellate court reversed Siler's convictions and remanded for a new trial, holding that Nathan's statements to Detective Martin were testimonial and that their admission during trial violated Siler's Sixth Amendment right to confront witnesses against him, stating, "there is presently no cognizable dispute concerning whether the child was unavailable * * * and whether defense counsel was given a prior opportunity to cross-examine him." *State v. Siler*, 164 Ohio App.3d 680, 2005-Ohio-6591, 843 N.E.2d 863, ¶49. The appellate court explained, "Martin's questioning of Nathan, although resulting in allowable 'excited utterances' under the Ohio Rules of Evidence, was

nonetheless a structured police interrogation as envisioned in *Crawford*, and therefore constituted testimonial evidence." Id. The court further held that the erroneous "admission of Nathan's statements was not harmless beyond a reasonable doubt." Id. at ¶ 50.

{¶ 18} The state appealed the decision that Nathan's statements to Martin were testimonial, contending that the appellate court misapplied *Crawford* and contravened our subsequent holding in Stahl when it concluded that Nathan's statements were testimonial because they resulted from police interrogation. The state urges that Nathan's statements should not be considered testimonial, asking us to apply the objective-witness test established in *Stahl* and to consider the statements from the perspective of a three-year-old declarant, who could not have understood that his statements would be available for use at a later trial.

{¶ 19} Siler, on the other hand, asserts that the objective-witness test adopted in *Stahl* is inapposite because Stahl involved statements made to a nurse for medical purposes, not to law-enforcement officers for investigatory purposes. He contends that in *Davis v. Washington* (2006), ___ U.S. ___, 126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 224, the court set forth a different test that applies to statements generated

from police interrogation, and he argues that *Davis* stands for the proposition that when the primary purpose of the police interrogation is to determine what has occurred in the past, without regard to an ongoing emergency, then the statements generated are testimonial for purposes of Confrontation Clause analysis, regardless of the age of the declarant.

{¶ 20} Thus, we are called upon to set forth an appropriate test for courts to apply when faced with a Sixth Amendment challenge to statements made by a child declarant in response to police interrogation.

Crawford, Davis, and Stahl

{¶ 21} In *Crawford*, the United States Supreme Court held that the proper analysis for determining whether out-of-court statements violate the Confrontation Clause is not whether they are reliable but, rather, whether they are testimonial. 541 U.S. at 61, 124 S.Ct. 1354, 158 L.Ed.2d 177. The court went on to state that the Confrontation Clause does not apply to nontestimonial hearsay but that "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68.

{¶ 22} Although the court expressly declined to set forth a comprehensive definition for the term

"testimonial," it described three "formulations of this core class of 'testimonial' statements," one of which includes statements " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " Id., 541 U.S. at 51-52, 124 S.Ct. 1354, 158 L.Ed.2d 177, quoting the brief of amicus curiae National Association of Criminal Defense Lawyers. The court further stated, "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations.*" (Emphasis added.) Id. at 68.

{¶ 23} Two years after its decision in *Crawford*, the court revisited the issue of testimonial statements in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana* (2006), ___ U.S. ___, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224. *Davis* involved statements that a domestic-violence victim made to a 911 operator identifying her assailant and describing his whereabouts immediately after an assault, while *Hammon* involved statements made to police officers responding to a domestic-violence complaint after they had secured the scene. Id., ___ U.S. at ___, 126 S.Ct. at 2270-2272, 165 L.Ed.2d 224..

{¶ 24} In considering whether the statements in these cases were testimonial, the court distinguished between police interrogations that concern an ongoing emergency and those that relate to past criminal conduct. Id., ___ U.S. at ___, 126 S.Ct. at 2276-2278, 165 L.Ed.2d 224. Thus, it formulated what courts around the country have come to refer to as the primary-purpose test (see, e.g., *People v. Geier* (2007), 41 Cal.4th 555, 61 Cal.Rptr.3d 580, 161 P.3d 104; *State v. Kirby* (2006), 280 Conn. 361, 908 A.2d 506): "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ___ U.S. at ___, 126 S.Ct. at 2273-2274, 165 L.Ed.2d 224.

{¶ 25} Applying that test, the court determined that "the circumstances of [the 911] interrogation [in *Davis*] objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency." Id., ___ U.S. at ___, 126 S.Ct. at 2276.

Accordingly, those statements were nontestimonial. Id. In *Hammon*, however, the court stated, "Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." Id., ___ U.S. at ___, 126 S.Ct. at 2278. Therefore, the court held that those statements were testimonial. Id.

{¶ 26} In *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, we considered whether an adult rape victim had made testimonial statements to a nurse practitioner during a medical examination at a hospital DOVE unit specializing in health care for victims of rape and domestic violence. There, for analysis of a statement made to a medical professional, we adopted the objectivewitness test from *Crawford*, stating, "For Confrontation Clause purposes, a testimonial statement includes one made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " Id. at paragraph one of the syllabus, quoting *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354, 158 L.Ed.2d 177. We further held, "In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a

questioner is relevant only if it could affect a reasonable declarant's expectations." Id. at paragraph two of the syllabus.

{¶ 27} In *Stahl*, we expressly acknowledged *Davis* and *Hammon* but distinguished them, stating, "They involve statements made to law-enforcement officers, while the statement at issue here covers one made to a medical professional at a medical facility for the *primary* purpose of receiving proper medical treatment and not investigating past events related to criminal prosecution." (Emphasis sic.) 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, ¶25. Applying the objective-witness test, instead, we concluded that the statements made by the rape victim to the nurse were nontestimonial because she "could have reasonably believed that although the examination conducted at the DOVE unit would result in scientific evidence being extracted for prosecution purposes, the statement would be used primarily for health-care purposes." Id. at ¶47.

The Primary-Purpose Test

{¶ 28} Although the state and amicus curiae, the American Prosecutors Research Institute ("APRI"), invite us to apply the objective-witness test, as we did in *Stahl*, we decline to do so because the

primary-purpose test enunciated in *Davis* is the more appropriate analysis. Contrary to the assertions of the state and APRI, *Stahl* is factually distinguishable from the instant case based on the identity of the interrogator and the purpose of the questioning. The distinction is as significant here as it was in *Stahl*, where we specifically concluded that the objective-witness test applied, rather than the primary-purpose test in *Davis*, because of the *lack* of a law-enforcement interrogator. 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, ¶25. Moreover, the court in *Davis* acknowledged that its "holding is not an 'exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation,' *supra*, [___ U.S. at ___, 126 S.Ct.] at 2273 165 L.Ed.2d 224], but rather a resolution of the cases before us *and those like them*." (Emphasis added.) ___ U.S. at ___, 126 S. Ct. at 2278, 165 L.Ed.2d 224, fn. 5.

{¶ 29} Since *Davis*, courts have consistently applied the primary-purpose test to statements that a child declarant made to police or those determined to be police agents, and we are aware of no courts that continue to apply the objective-witness test in such cases. See, e.g., *People v. Cage* (2007), 40 Cal.4th 965, 56 Cal.Rptr.3d 789, 155 P.3d 205 (15-year-old's

statements to police); *People v. Sharp* (Colo.App.2006), 155 P.3d 577 (five-year-old's statements to forensic interviewer during visit arranged by police); *Hernandez v. State* (Fla.App.2007), 946 So.2d 1270 (statements made by child of unknown age to "Child Protection Team" nurse); *People v. Stechly* (2007), 225 Ill.2d 246, 312 Ill.Dec. 268, 870 N.E.2d 333 (five-year-old's statements to child-sex-abuse personnel); *State v. Henderson* (Kan.2007), 160 P.3d 776 (three-year-old's statements to police and child-protective-services worker); *State v. Justus* (Mo.2006), 205 S.W.3d 872 (three-year-old's statements to child-abuse investigators); *State v. Buda* (2006), 389 N.J.Super. 241, 912 A.2d 735 (three-year-old's statements to youth-services worker); *State v. Blue*, 2006 N.D. 134, 717 N.W.2d 558 (four-year-old's statements to forensic interviewer with police observing); *In re S.R.*, 2007 Pa.Super. 79, 920 A.2d 1262 (four-year-old's statements to forensic interview specialist); *State v. Hooper* (Aug. 11, 2006), Payette App. No. 31025, ___ Idaho ___, ___P.3d ___, 2006 WL 2328233 (six-year-old's statements to sexual trauma personnel during visit arranged and observed by police).

{¶ 30} Thus, we conclude that to determine whether a child declarant's statement made in the

course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington* (2006), __ U.S. at __, 126 S.Ct. at 2273-2274, 165 L.Ed.2d 224.

{¶ 31} Having determined that the primary-purpose test applies in this instance, we next consider the argument of the state and APRI that a child's statements to police are nontestimonial when the child, because of his or her age and limited understanding of court or trial, could not reasonably expect that those statements may be used in a later criminal proceeding.

{¶ 32} We recognize, as did the court of appeals in this case, that "younger children have lesser reflective capabilities," *Siler*, 164 Ohio App.3d 680, 2005-Ohio-6591, 843 N.E.2d 863, at ¶ 9, citing *State*

v. Wagner (1986), 30 Ohio App.3d 261, 30 OBR 458, 508 N.E.2d 164; we further acknowledge the authorities submitted by APRI indicating that children lack an understanding of court proceedings and testimony. See, e.g., R. Friedman, The Conundrum of Children, Confrontation, and Hearsay (2002), 65 Law & Contemp.Prob. 243, 251-252.

{¶ 33} The court's analysis in *Davis*, however, does not focus on the expectations of the declarant in order to determine whether statements are testimonial; rather, the test set forth in *Davis* centers on the statements and the objective circumstances indicating the primary purpose of the interrogation. ___ U.S. at ___, 126 S.Ct. at 2273-2274, 165 L.Ed.2d 224. In this way, the argument by the state and APRI that we should focus on the cognitive limitations of a child who made the statements to police is inconsistent with the primary-purpose test.

{¶ 34} The state and APRI cite numerous cases in support of their position that statements made by child declarants are nontestimonial because of their lack of understanding. Those cases are inapposite, however, because they do not concern statements that a child made to law-enforcement officers or to individuals held to be agents of law enforcement. *See*

People v. Vigil (Colo.2006), 127 P.3d 916 (seven-year-old's statements to doctor, father, and father's friend); *Commonwealth v. DeOliveira* (2006), 447 Mass. 56, 849 N.E.2d 218 (six-year-old's statements to doctor); *State v. Scacchetti* (Minn.2006), 711 N.W.2d 508 (three-year-old's statements to nurse); *State v. Brigman* (2006), 178 N.C.App. 78, 632 S.E.2d 498 (children's statements to mother); *State v. Johnson*, Butler App. No. CA 2005-10-422, 2006-Ohio-5195 (nine-year-old's statements to medical staff); *State v. Copley*, Franklin App. No. 04AP-1128, 2006-Ohio-2737 (three-year-old's statements to mother); *State v. Muttart*, Hancock App. No. 5-05-08, 2006-Ohio-2506 (five- and six-year-old children's statements to medical professional), affirmed in part and reversed in part, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944; *United States v. Coulter* (2005), 62 M.J. 520 (two-yearold's statements to mother).

{¶ 35} Only one case cited by the state and APRI concludes that a child's statements made during a police interrogation were nontestimonial: *Lagunas v. State* (Tex.App.2005), 187 S.W.3d 503. There, police responding to a 911 call found an injured woman who had been abducted from her home but who had managed to escape her captor. She

told the police that her two children, ages two and four, were still at home, and an officer was dispatched to check on their safety. Upon arrival, the officer entered the house, found the children in bed, and asked the four-year-old if everything was okay. As the *Lagunas* court recounted, "[The child] responded that it wasn't and added, 'Her mommy was dead.' At this point, [the officer] asked [her] what happened to her mother. She responded, 'A bad man had killed her and took her away' and grew more upset. * * * He did not question [her] further." *Lagunas*, 187 S.W.3d at 520. The Texas court of appeals concluded that the child's statements were nontestimonial after applying the objective-witness test, in which it considered the age of the child.

{¶ 36} The court's analysis and decision predated the establishment of the primary-purpose test in *Davis*. Moreover, although the court in *Lagunas* considered the child's age in its analysis, it specifically stated, "We need not decide now whether, as a general rule, statements by children are inherently non-testimonial or whether [the child's] age alone renders her statements non-testimonial." 187 S.W.3d at 519. Furthermore, the court's analysis paralleled the analysis in *Davis* by focusing on the purpose of the interrogation; as the *Lagunas* court

explained, the officer's questioning of the child "was closer in nature to a preliminary question in which [the officer] sought to clarify [the child's] spontaneous statement that her mother was dead. There was not time to formulate careful, structured questioning. Instead, [the officer's] questions were consistent with the behavior of a reasonable adult seeking (in some ways successfully, in some ways not) to calm a frightened child in the middle of the night. Significantly, after calming [the child], [the officer] asked her no further questions regarding the circumstances of her mother's disappearance." Id. at 520. Thus, *Lagunas* supports the conclusion not only that the primary-purpose test is appropriate in cases involving police interrogation of a child but also that the declarant's age is not dispositive when determining whether statements to police are testimonial.

{¶ 37} We similarly distinguish *State v. Bobadilla* (Minn.2006), 709 N.W.2d 243, which APRI primarily relies upon for the proposition that a child's limited cognitive ability renders his statements nontestimonial. There, a three year old sex-abuse victim made statements to a child-protection worker during a risk-assessment interview while a police detective observed. The Minnesota Supreme Court

held that the child's statements were nontestimonial because "the interview of [the child] was initiated by a child-protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child" and because "neither [the child] nor the child-protection worker were acting, to a substantial degree, in order to produce a statement for trial, and therefore [the child's] statements in the assessment interview were not testimonial." *Bobadilla*, 709 N.W.2d at 255-256.

{¶ 38} Although the court acknowledged the child's limited cognitive abilities, this was not, as APRI claims, the focal point of its analysis; rather, the purpose of the interview constituted the dispositive issue: "If part of the purpose of this interview was to produce a statement for use at a future trial, such a purpose was at best incidental to the main purpose: assessing and responding to imminent risks to [the child's] health and welfare." Id. at 255. Moreover, as with *Lagunas*, the court decided *Bobadilla* without the benefit of the analysis that the United States Supreme Court set forth in *Davis*.

{¶ 39} We are aware of no case in which a court has concluded that a declarant's age rendered statements to police nontestimonial. Rather, courts have held that children's statements to police or police agents are testimonial in circumstances that indicate that no ongoing emergency existed and that the primary purpose of the interrogation was to establish past events potentially related to later criminal prosecution. See, e.g., *T.P. v. State* (Ala.Crim.App.2004), 911 So.2d 1117 (eight-year-old's statements to social worker and investigator as part of criminal investigation); *People v. Cage*, 40 Cal.4th 965, 56 Cal.Rptr.3d 789, 155 P.3d 205 (15-year-old's statements to police); *People v. Sisavath* (2004), 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753 (four-year-old's statements to police); *People v. Sharp*, 155 P.3d 577 (five-year-old's statements to forensic interviewer during visit arranged by police); *People ex rel. R.A.S.* (Colo.App.2004), 111 P.3d 487 (four-year-old's statements to police); *Hernandez v. State*, 946 So.2d 1270 (statements made by child of unknown age to "Child Protection Team" nurse); *State v. Grace* (Haw.App.2005), 107 Hawai'i 133, 111 P.3d 28 (ten- and eleven year-old children's statements to police); *State v. Hooper*, Payette App. No. 31025, ___ Idaho ___, ___ P.3d ___, 2006 WL 2328233 (six-year-old's

statements to sexual trauma personnel during visit arranged by police); *People v. Stechly*, 225 Ill.2d 246, 312 Ill.Dec. 268, 870 N.E.2d 333 (five-year-old's statements to child-sex-abuse personnel); *State v. Henderson*, 160 P.3d 776 (three-year-old's statements to police and child-protective-services worker); *State v. Snowden* (Md.App.2005), 385 Md. 64, 867 A.2d 314 (eight- and ten-year-old children's statements to sex-abuse personnel during police investigation); *State v. Justus*, 205 S.W.3d 872 (three-year-old's statements to child-abuse investigators); *State v. Blue*, 2006 ND 134, 717 N.W.2d 558 (four-year-old's statements to forensic interviewer with police observing); *State v. Buda*, 389 N.J.Super. 241, 912 A.2d 735 (three-year-old's statements to youth-services worker); *State v. Mack* (2004), 337 Or. 586, 101 P.3d 349 (three-year-old's statements to case worker in an interview directed by the police); *In re S.R.*, 2007 Pa.Super. 79, 920 A.2d 1262 (four-year-old's statements to forensic interview specialist); *Rangel v. State* (Tex.App.2006), 199 S.W.3d 523 (six-year-old child's statements to child protective services); *United States v. Bordeaux* (C.A.8 2005), 400 F.3d 548 (statements by child of unknown age to forensic interviewer).

{¶ 40} Significantly, several courts have expressly rejected the state's and APRI's argument that a child's statements are necessarily nontestimonial when the child would not be able to understand that the statements would be used in a later criminal proceeding. *State v. Henderson*, 160 P.3d at 785, citing *State v. Justus*, 205 S.W.3d 872 ("A young victim's awareness, or lack thereof, that her statement would be used to prosecute, is not dispositive of whether her statement is testimonial"); *State v. Snowden*, 385 Md. at 89-90, 867 A.2d 314 ("we are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants"); *Commonwealth v. DeOliveira*, 447 Mass. at 66, 849 N.E.2d 218 (declining to adopt the same argument that APRI presents here); *People v. Vigil*, 127 P.3d at 926, fn. 8 ("if a child makes a statement to a government agent as part of a police interrogation, his statement is testimonial irrespective of the child's expectations regarding whether the statement will be available for use at a later trial"); see, also, *State v. Hooper*, Payette App. No. 31025, ___ Idaho ___, ___ P.3d ___, 2006 WL 2328233, *17.

{¶ 41} Thus, we conclude that the age of a declarant is not determinative of whether a testimonial statement has been made during a police interrogation.

{¶ 42} Our conclusions in this case regarding a police interrogation of a child do not affect our decision in *Stahl*, which applied the objective-witness test to determine whether a declarant had made testimonial statements during an interview conducted by a nurse at a DOVE unit for purposes other than to investigate a past crime. In this regard, we agree with the Supreme Court of Illinois, in *People v. Stechly*, which recently concluded that the objective-witness test applied to statements that a five-year-old child made to her mother but that the primary-purpose test set forth in *Davis* applied to statements that she made during an interrogation conducted by an agent of the police. 225 Ill.2d at 299-302, 312 Ill.Dec. 268, 870 N.E.2d 333. See, also, *Vigil*, 127 P.3d at 926, fn.8 (applying the objective-witness test to a child's statements to a nonpolice questioner but stating that the child's statements to police during an investigation are testimonial regardless of child's expectations); and *State v. Mechling* (2006), 219 W.Va. 366, 633 S.E.2d 311 (the objective-witness test applies, generally, but statements generated

from police interrogation require application of the analysis in *Davis*); but see *State v. Alvarez* (App.2006), 213 Ariz. 467, 143 P.3d 668; and *People v. Cage*, 40 Cal.4th 965, 56 Cal.Rptr.3d 789, 155 P.3d 205 (holding that after *Davis*, the objective-witness test no longer applies).

Application of the Primary-Purpose Test in This Case

{¶ 43} The record reveals that before Detective Martin arrived at the scene, Deputy Singleton had entered the home, awakened Nathan, and taken him outside. The Ashland County Sheriff's Office had secured the crime scene and had begun its investigation into Barbara's death. Martin testified that he had been briefed before he began questioning Nathan, that Nathan did not appear nervous or upset, and that Nathan was sitting in his grandfather's lap during the questioning. Thus, this record does not reflect the existence of an ongoing emergency.

{¶ 44} Martin identified the primary purpose of Nathan's questioning when he testified that he would "attempt to identify what information the child might have as to what had happened." In addition, Nathan's statements concerned what had occurred the night before in relation to Martin's effort to

establish past events possibly relevant to a criminal prosecution.

{¶ 45} The interrogation before us parallels that in *Hammon*, where the court stated: "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct * * *. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything * * *. When the officers first arrived, [the declarant] told them that things were fine, * * * and there was no immediate threat to her person." ___ U.S. at ___, 126 S.Ct. at 2278, 165 L.Ed.2d 224. The court further stated, "[The declarant's] statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation * * *." Id., ___ U.S. at ___, 126 S.Ct. at 2279, 165 L.Ed.2d 224.

{¶ 46} As the court stated with respect to the interrogation in *Hammon*, "Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime * * *." Id. at 2278. We conclude that the same is true of this interrogation.

Conclusion

{¶ 47} In conformity with Davis and the weight of authority in other jurisdictions, we conclude that Nathan made testimonial statements to Detective Martin, and as a result we are constrained to affirm the judgment of the court of appeals. We further agree with the statement by the court of appeals that, for purposes of remand, the Confrontation Clause " 'does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.' " *Siler*, 164 Ohio App.3d 680, 2005-Ohio-6591, 843 N.E.2d 863, ¶51, quoting Crawford, 541 U.S. at 59, 124 S.Ct.1354, 158 L.Ed.2d 177, fn. 9.

Judgment affirmed.

MOYER, C.J., and PFEIFER, O'CONNOR, and MCGRATH, JJ., concur.

LUNDBERG STRATTON and LANZINGER, JJ., concur in part and dissent in part.

PATRICK M. MCGRATH, J., of the Tenth Appellate District, sitting for CUPP, J.

LANZINGER, J., concurring in part and dissenting in part.

{¶ 48} I concur in the judgment and in paragraph two of the syllabus only, because the majority unduly limits the primary-purpose rule

stated in paragraph one by referring only to a "child" declarant and expands the scope of the opinion beyond the stated issue.

{¶ 49} As we elaborate our understanding of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct.1354, 158 L.Ed.2d 177, and our examination of Ohio law regarding what statements are testimonial for purposes of the Confrontation Clause, I believe we should articulate clear guidance for judges who must make these decisions initially. In *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, we declined to expand the definition of "testimonial statements" to include statements made to a medical professional for purposes of receiving medical treatment or diagnosis. In *Stahl*, we adopted the "objective witness" formulation set forth in *Crawford* to discover whether statements were made " 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " *Stahl* at ¶ 36, quoting *Crawford*, 541 U.S. at 52, 124 S.Ct.1354, 158 L.Ed.2d 177. We adopted the objective-witness test not because the declarant was an adult but because of the identity of the questioner—a medical professional, rather than a law enforcement officer.

{¶ 50} In analyzing whether statements are testimonial, the identity of the questioner is the first issue to resolve. Whenever the interrogators are members of law enforcement, the rule regarding any statements made by a declarant in response is governed by the primary-purpose test, as explained in *Davis v. Washington* (2006), ___ U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224. If the primary purpose of the police questioning is to elicit statements that relate to an ongoing emergency, the statements are nontestimonial; if the primary purpose is to prove past events that relate to a potential criminal prosecution, they are testimonial. I agree with paragraph two of the syllabus, which makes it clear that age is irrelevant when a declarant is under police interrogation. In other words, the primary-purpose test is used if the police are questioning.

{¶ 51} Assuming the questioner is not a member of law enforcement, as was the case in *Stahl*, the objective-witness standard (at least for an adult) applies: whether the statement was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354, 158 L.Ed.2d 177.

{¶ 52} The majority opinion frames the issue of the instant case to set forth "an appropriate test for courts to apply when faced with a Sixth Amendment challenge to statements made by a child declarant *in response to police interrogation*." (Emphasis added.) Thus, to the extent that the majority discusses consequences of statements made by children to interrogators who are not law enforcement, the opinion exceeds its self-imposed boundary.

{¶ 53} In my view, it is still an open question whether children, by virtue of their reasoning abilities, should be subject to the objective-witness standard as expressed in *Stahl* when they are questioned by those other than police officers. We should hesitate to express dicta on this issue when the ramifications on any ruling regarding testimonial statements can be so great, particularly where the child is the victim as well as the witness, in, for example, sexual abuse cases. I therefore dissent as to the portion of the opinion that exceeds the issue of the police interrogation of children.

LUNDBERG STRATTON, J., concurs in the foregoing opinion.

Ramona Francesconi Rogers, Ashland County Prosecuting Attorney, and Joyce Anderson, Assistant Prosecuting Attorney, for appellant.

David H. Bodiker, Ohio Public Defender, and Jill E. Stone and Craig M. Jaquith, Assistant Public Defenders, for appellee.

Alice Anna Phillips, urging reversal for amicus curiae, American Prosecutors Research Institute.

The STATE OF OHIO, Plaintiff-Appellee,
v.
BRIAN K. SILER, Defendant-Appellant

[Cite as State v. Siler,
164 Ohio App.3d 680, 2005-Ohio-6591]

Court of Appeals of Ohio, Fifth District,
Ashland County.

Case No. 02 COA 028.

Decided Dec. 13, 2005.

Ramona Francesconi Rogers, Ashland County Prosecutor, for appellee.

David H. Bodiker, State Public Defender, Jill E. Stone and Craig Jaquith, Assistant State Public Defenders, for appellant.

WISE, Judge.

{¶ 1} Pursuant to a remand order from the United States Supreme Court, we herein reconsider appellant Brian K. Siler's appeal from his conviction and sentence for murder in the Court of Common Pleas, Ashland County, Ohio. The appellee is the state of Ohio. The relevant procedural facts leading to this appeal are as follows.

{¶ 2} In the early afternoon of Thursday, September 20, 2001, the body of Barbara Siler, the estranged wife of appellant, was discovered hanging by a rope from an overhead door track in her garage in Ashland, Ohio. Nathan Siler, the three-year-old son of appellant and Barbara, was found sleeping in another room. On December 12, 2001, the Ashland County Grand Jury handed down a seven-count indictment against appellant, including aggravated murder and child endangering. Following a five-day trial, the jury returned a verdict of guilty on all counts. Following a mitigation hearing on June 11, 2002, the jury recommended a sentence of death. Nonetheless, the trial court sentenced appellant to life in prison without parole. On July 29, 2002, appellant filed a notice of appeal, raising 13 assignments of error. On October 24, 2003, this court affirmed the conviction and sentence, holding inter alia that the trial court did not commit reversible error in allowing Ashland County Sheriff's Detective Larry Martin's testimony concerning Nathan Siler's statements made to him on September 20, 2001, as excited utterances under Evid.R. 803(2). See *State v. Siler*, Ashland App. No. 02COA028, 2003-Ohio-5749, 2003 WL 22429053 ("*Siler I*").

{¶ 3} The Ohio Supreme Court thereafter declined to accept review of appellant's case. See *State v. Siler*, 101 Ohio St.3d 1489, 2004-Ohio-1293, 805 N.E.2d 539. The court thereafter also denied reconsideration of that decision. See *State v. Siler*, 102 Ohio St.3d 1462, 2004-Ohio-2569, 809 N.E.2d 34.

{¶ 4} Appellant then filed a petition for a writ of certiorari with the United States Supreme Court. On December 6, 2004, the United States Supreme Court ordered that the judgment be vacated and that the cause be remanded to this court for further consideration in light of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. See *Siler v. Ohio* (2004), 543 U.S. 1019, 125 S.Ct. 671, 160 L.Ed.2d 494.

{¶ 5} Accordingly, appellant herein sets forth the following sole assignment of error:

{¶ 6}"I. The trial court erred in permitting Nathan Siler's hearsay statements to Detective Martin to be admitted as excited utterances, thereby depriving Mr. Siler of his right to confront witnesses, as guaranteed by the 6th and 14th Amendments, U.S. Constitution."

I

{¶ 7} In his sole assignment of error, appellant argues that the trial court allowance of police testimony concerning out-of-court statements made by the child of the victim and appellant deprived appellant of his constitutional right to confront witnesses guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In light of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, we agree.

{¶ 8} In *Crawford*, the United States Supreme Court held that testimonial statements of a witness who does not appear at trial may not be admitted or used against a criminal defendant unless the declarant is unavailable to testify and the defendant has had a prior opportunity for cross-examination. The remand in the case sub judice from the United States Supreme Court solely directs us to reconsider our prior decision "in light of *Crawford*." See *Siler v. Ohio* (2004), 543 U.S. 1019, 125 S.Ct. 671, 160 L.Ed.2d 494. Thus, the pressing question before us is whether the child's statements to Detective Martin were "testimonial." If we should answer that question in the affirmative, we would then proceed to

consider whether the child was unavailable and whether defense counsel had been given a prior opportunity to cross-examine him. We would also proceed to a consideration of whether the allowance of the statements constituted mere harmless error. If, on the other hand, we were to conclude that the child's statements are nontestimonial, we would be compelled to affirm appellant's conviction, because we have previously determined that the trial court did not abuse its discretion in allowing them into evidence as "excited utterances" under Evid.R. 803(2).

{¶ 9}*Crawford* does not provide a precise definition of "testimonial" evidence. On the one hand, the Supreme Court recited one definition as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id., 541 U.S. at 52, 124 S.Ct. 1354, 158 L.Ed.2d 177, citing Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. Since in the case sub judice we are dealing with a young child witness, we are confronted with the question of whether any three-year-old child witness would ever have the intellectual maturity to

understand that his statements to an officer were going to be used in a later trial, as would an objective adult. Indeed, "[c]ourts around the nation have struggled with the application of *Crawford* to child witnesses, particularly how courts should apply the [aforesaid] concept * * * or whether the proper test should be objective or subjective in nature." *Lagunas v. State* (Aug. 26, 2005), Tex.App.-Austin No. 03-03-00566-CR, 2005 WL 2043678, 187 S.W.3d 503. Ohio appellate courts have recognized that younger children have lesser reflective capabilities. See, e.g., *State v. Wagner* (1986), 30 Ohio App.3d 261, 30 OBR 458, 508 N.E.2d 164. In a related vein, it is generally recognized that admissions and confessions of juveniles require special attention. See *In re Harris* (June 7, 2000), Tuscarawas App. No.1999AP030013, 2000 WL 748087, citing *Haley v. Ohio* (1948), 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224.

Obviously, the Confrontation Clause on its face makes no distinction as to the age of the witness. However, the Supreme Court, in addressing "hearsay exception" statements by young children, has also indicated (although before *Crawford*) that "[t]o exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the

Confrontation Clause has as a basic purpose the promotion of the 'integrity of the factfinding process.' " *White v. Illinois* (1992), 502 U.S. 346, 356, 112 S.Ct. 736, 116 L.Ed.2d 848, quoting *Coy v. Iowa* (1988), 487 U.S. 1012, 1020, 108 S.Ct. 2798, 101 L.Ed.2d 857.

{¶ 10} On the other hand, the vexing questions of the present case cannot escape the plain fact that the Supreme Court in *Crawford* did set forth several concrete examples of "testimonial" evidence: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354, 158 L.Ed.2d 177. "The Court noted these practices bore the closest kinship to the abuses at which the Confrontation Clause was directed, to wit ex parte examinations of witnesses by justices of the peace." *State v. Williams*, Montgomery App. No. 20368, 2005-Ohio-213, 2005 WL 120054, ¶ 19. This becomes our main subquestion; in other words, did Detective Martin's interview of the child constitute an "interrogation" of a witness?

{¶ 11} We first observe that the Supreme Court used the term "interrogation" in its "colloquial, rather than any technical legal, sense." See *Crawford*, 541 U.S. at 53, 124 S.Ct. 1354, 158 L.Ed.2d 177, at fn. 4. We also note that the court consistently utilized the term "interrogation" in the opinion rather than "interview" or "questioning." At first blush, one might easily conceive of "interrogation" as police questioning involving an actual suspect, which was clearly not the case in the present appeal. Black's Law Dictionary has defined the term as a "process of questions propounded by police to person arrested or suspected to seek solution of crime." Black's Law Dictionary (5 Ed.1979) 734. However, the *Crawford* court, in its analysis of the roots of the Confrontation Clause and the dangers it was designed to prevent, noted that the courts of England at certain times in history adopted elements of the continental civil-law practice, and therefore "[j]ustices of the peace or other officials examined suspects *and* witnesses before trial." (Emphasis added.) *Crawford*, 541 U.S. at 43, 124 S.Ct. 1354, 158 L.Ed.2d 177. Furthermore, "[t]here is no requirement that a peace officer take someone into custody as a prerequisite to interrogating him." *State v. Martin* (2003), 151 Ohio App.3d 605, 619, 784 N.E.2d 1237. Hence, we

conclude that "interrogation" as defined in *Crawford* applies to questioning of both suspects and witnesses.

{¶ 12} The *Crawford* court further observed that "[j]ust as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation' * * *." *Crawford*, 541 U.S. at 53, 124 S.Ct. 1354, 158 L.Ed.2d 177, fn. 4. The court therein declined to further select a definition, because under the facts of that case, the recorded statement made to police by Michael Crawford's wife, Sylvia, "knowingly given in response to *structured police questioning*, qualifies under any conceivable definition." (Emphasis added.) Id.

[2] {¶ 13} In the case sub judice, Detective Martin came upon the scene at about 2:00 p.m. on September 20, 2001, and commenced his interview with Nathan about 20 minutes later. He testified at trial that he had received training in interviewing young children.

The state's presentation at trial of Martin's interviewing procedure is set forth as follows:

{¶ 14}"Q. Are there things you do, Detective, to attempt to facilitate a conversation with a child to make it easier for the child?

{¶ 15} "A. Yes.

{¶ 16} "Q. Tell the jury some of the things you do to make it easier for the child?

{¶ 17} "A. Well, basically I try to like find out their likes, dislikes. Get a basic knowledge of the child. Try to listen intensely as the child is speaking.

{¶ 18} "I've never spoken to a lot of these kids I have spoken to before. Get an understanding how well they receive information. How well they are able to relate that information back to me.

{¶ 19} "A lot of times I'll go one-on-one conversation, which means I use anywhere from baby dolls to teddy bears, things of that nature, to have the child actually talk to a teddy bear or something of that nature instead of talking to an adult. Have him concentrate just looking at the teddy bear like it was the teddy bear he was talking to and not I as a person.

{¶ 20} "I also try to get down to their level, which means if somebody is sitting in a chair, I'll get lower than they are so the child is not looking up at me.

They're looking down at me. If they are on the ground, I'll get on the ground.

{¶ 21} "Q. In this case when you initially approached Nathan, he was on his grandpa's lap, sitting on the ground, correct?

{¶ 22} "A. Correct.

{¶ 23} "Q. How did you talk to him physically? How were you positioned?

{¶ 24} "A. I laid down on my stomach and was talking to him.

{¶ 25} "Q. Was Nathan eventually able to tell you his name?

{¶ 26} "A. Yes.

{¶ 27} "Q. And his age?

{¶ 28} "A. Yes.

{¶ 29} "Q. What he liked to do?

{¶ 30} "A. Yes.

{¶ 31} "Q. What type of questions do you attempt to ask when you're interviewing a child?

{¶ 32} "A. Attempt to locate-or attempt to identify what information the child might have as to what had happened.

{¶ 33} "Q. Did you ask Nathan anything about the evening before?

{¶ 34} "A. I did.

{¶ 35} "Q. What did you ask Nathan?

{¶ 36} "A. Basically what he had did the night before, where he had went.

{¶ 37} "Q. Did he tell you what he had done the night before?

{¶ 38} "A. He did.

{¶ 39} "Q. What did he tell you he had done the night before?

{¶ 40} "A. Went to the fair.

{¶ 41} "Q. And who did he say he had gone to the fair with did he tell you?

{¶ 42} "A. Mommy and Terrie.

{¶ 43} "Q. Did you ask him anything more about the evening before?

{¶ 44} "A. Yes.

{¶ 45} "Q. Tell the jury what you talked about."

{¶ 46} Martin continued asking Nathan some questions about the trip to the county fair the night before, then asked him if anything had scared him that night after returning home. Nathan told him, "Daddy did." Martin then asked him how appellant had scared him, to which the child replied, "Knocking loudly." When Martin asked him what he meant, Nathan jumped off his grandfather's lap, where he had been sitting, and ran to the front door to demonstrate. Martin then asked Nathan if anything else had scared him. Nathan replied, "Daddy, mommy fighting." When asked where this had

occurred, Nathan said it had taken place in the garage.

{¶ 47} Martin initially spoke with the child for about 30 to 45 minutes. At that point, Nathan indicated that he was hungry, and Martin also noted that Nathan was behaving as though he wanted to go back into the house to find Barbara. Martin therefore agreed to let Terrie, Barbara's friend, take the child away from the area to get something to eat. Martin directed Terrie to forbid anyone to question the child during that period.

{¶ 48} When Nathan was brought back to the yard after his meal, Martin, joined by Jenny Taylor, a children's services investigator, asked Nathan if "anyone was hurting mommy" during the prior night's incident. Nathan stated, "Daddy did." Martin then asked Nathan some questions, using Taylor as a mock victim. Martin held Taylor in certain fighting positions, finally standing to the back of Taylor and putting his arm around her in a hold position. Martin then asked Nathan, "Like that?" Nathan replied, "Up." Martin then moved his arm up towards Taylor's neck or throat area. At that point, Nathan said, "Yes," and he started crying.

Martin finally asked Nathan, in reference to the hanging rope, if he knew who had put the "yellow thing" around Nathan's mother. Nathan answered that "daddy" had done it.

{¶ 49} In light of the above testimony, we conclude that Detective Martin's questioning of Nathan, although resulting in allowable "excited utterances" under the Ohio Rules of Evidence, was nonetheless a structured police interrogation as envisioned in *Crawford* and therefore constituted testimonial evidence.[FN1] Because there is presently no cognizable dispute concerning whether the child was unavailable for the pre-*Crawford* trial and whether defense counsel was given a prior opportunity to cross-examine him, and having concluded that Nathan Siler's statements were testimonial evidence under *Crawford*, we must now determine whether the Confrontation Clause error was "harmless beyond a reasonable doubt." See, e.g., *Flores v. Nevada* (Nev.2005), 120 P.3d 1170, 1180, citing *Chapman v. California* (1967), 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705. In order to make this determination, we must inquire "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v.*

Madrigal (2000), 87 Ohio St.3d 378, 388, 721 N.E.2d 52, citing *Chapman*, supra.

> FN1. Appellant also argues that a testimonial statement and an excited utterance are mutually exclusive. However, the Indiana appellate case cited by appellant in support, *Fowler v. State* (Ind.Ct.App.2004), 809 N.E.2d 960, has since been abrogated by the Indiana Supreme Court, which has held that a statement that qualifies as an excited utterance is not necessarily nontestimonial under the Confrontation Clause. See *Hammon v. State* (Ind.2005), 829 N.E.2d 444.

{¶ 50} Having again reviewed the record, we conclude that the admission of Nathan's statements was not harmless beyond a reasonable doubt. Certainly, as we noted in *Siler I*, in the months preceding Barbara's death, she and appellant had experienced significant marital problems, and appellant had been upset about a terminated affair Barbara had carried on with one of her co-workers. In late July 2001, just two months prior to her death, Barbara obtained a temporary protection order. At that point, appellant

moved into the home of his brother, Kevin Siler, and Kevin's wife. On the evening of September 19, 2001, appellant did some basement remodeling work with Kevin and then watched TV with his brother. Kevin's wife went to bed at about 4:00 a.m. on September 20, 2001. About 15 minutes later, she awoke to sounds of banging and "clunking" from appellant's room. When she got up later, appellant and Kevin were gone from the house. Barbara's body was discovered by a sheriff deputy at about 1:45 p.m. that day, after Barbara's father had gone to her residence to check on her. The coroner later estimated her time of death as between 4:00 a.m. and 6:00 a.m. that morning. The outside door into the garage was ajar, as was the door from the garage to the house. Sheriff deputies, interviewing appellant that same day, observed that appellant's hands had red marks near each thumb and some of his fingers. Appellant also had scratch marks on top of some of his knuckles and on his chest, near his neck. The yellow rope around Barbara's neck contained traces of DNA, from which appellant could not be excluded as a source. No similar rope was found in the house. Thus, there was a body of circumstantial evidence pointing to appellant, but we find that this remaining evidence, absent Nathan's statements, does not

provide overwhelming proof of appellant's guilt for purposes of a "harmless error" analysis by this court. Cf. *State v. Goff*, Summit App. No. 21320, 2005-Ohio-339, 2005 WL 236377, ¶ 12, 13. Even if we were to take into consideration, as the state suggests, Nathan's statement to Martin that he had seen "mommy, daddy fighting," an utterance the child made in the early phase of the interview, we would remain unconvinced that the introduction of the remaining statements was harmless.

{¶ 51} Therefore, upon further consideration as directed by the United States Supreme Court, we are persuaded that appellant is entitled to a new trial pursuant to *Crawford*, although we reiterate for purposes of our remand that the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *State v. Marbury*, Montgomery App. No. 19226, 2004-Ohio-1817, 2004 WL 758404, ¶ 38, citing *Crawford*, 541 U.S. at 59, 124 S.Ct. 1354, 158 L.Ed.2d 177, fn. 9.

{¶ 52} Appellant's sole assignment of error is sustained.

{¶ 53} For the foregoing reasons, the judgment of the Court of Common Pleas, Ashland County, Ohio, is hereby reversed, and the cause is remanded for a new trial.

Judgment reversed and cause remanded.

BOGGINS, P.J., and GWIN, J., concur.
Ohio App. 5 Dist.,2005.
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164 Ohio App.3d 680, 843 N.E.2d 863, 2005 -Ohio-6591

END OF DOCUMENT

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being

twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion,

shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.